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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 105

DUQUESNE CLUB, PETITIONER

v.

HENRY D. BELL, AS FORMER ACTING COLLECTOR OF
INTERNAL REVENUE

No. 106

DUQUESNE CLUB, PETITIONER

v.

WILLIAM D. DRISCOLL, AS COLLECTOR OF INTERNAL
REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court
for the Western District of Pennsylvania (R.

289a-308a) is reported in 42 F. Supp. 123. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 326-331) is reported in 127 F. (2d) 363.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 13, 1942 (R. 331-332). The petition for writs of certiorari was filed June 5, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether during the period September 1, 1935, to July 1, 1938, the Duquesne Club was a "social" club within the meaning of Section 501 of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 413 of the Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of \$25 per year; or

(2) As initiation fees to such a club or organization, if such fees amount to more than \$10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of \$25 per year.

The regulations involved are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

The Duquesne Club, petitioner, instituted these actions in the District Court of the United States for the Western District of Pennsylvania to recover taxes paid on dues and initiation fees of its members for the periods from September 1, 1935, to March 1, 1936, and from the latter date to July 1, 1938, respectively. The cases were consolidated for trial pursuant to stipulation and were heard without a jury. The facts as found by the District Court may be summarized as follows:

The Duquesne Club is a non-profit corporation organized under the laws of Pennsylvania, its purpose, as outlined in its charter, being "the maintenance of a club for social enjoyment." It is located in Pittsburgh in the heart of the business and shopping districts. Its physical property consists of two adjoining buildings, the older of which is a five-story building and the other a modern twelve-story building. On the first floor are located a front lounge, front office, telephone room, billiard

and pool room having six pool and three billiard tables, cigar counter, check and wash rooms, and a hallway with two or three stock tickers. In the rear of this floor there is another lounge, which is seldom used, and a bar. Private and other dining rooms, of which there are altogether forty-four with a total seating capacity of over 1,200 persons, quarters for the management, service facilities, two bars, a barber shop, and several rooms used by the Club's "health department" occupy most of the next six floors. Sixty-five bedrooms are on the remaining floors, except the twelfth, which is used for storage. The "health department," where seven attendants are on duty from 9:00 A. M. until midnight, includes an exercise room for light calisthenics, massage room, steam room, baths, and doctor's office. But, apart from the billiard and pool room and a room where four card tables are provided, the Club affords no sport or recreational facilities. (R. 291a-293a, 294a-298a.)

Membership in the Club is open to males of legal age upon election by the Committee on Admissions and payment of an initiation fee of \$500 in the case of active members and of \$200 in the case of inactive members. Dues for active members are \$185 per year and for inactive \$92.50. During the period involved the membership averaged between sixteen and seventeen hundred. The membership is composed largely of executives of corporations from in or around Pittsburgh, but judges, educa-

tors, ministers, and others also belong.¹ R. 293a-294a.)

The Club does not sponsor any social, sporting, or athletic activities. It is primarily a club where members and their men guests meet to eat lunch, make contacts, exchange ideas, and have private conferences, directors' meetings, and other gatherings for the promotion of their business interests. Business and professional men have come to look upon the Club as a place in which to meet competitors and their business associates; and it is largely used for that purpose during the luncheon period. This use of the Club has drawn together and maintains its membership. The bedrooms are maintained to further the business interests and convenience of the members and to provide accommodations for out-of-town associates of business organizations to which the members belong. Breakfasts and dinners are served at the Club, but luncheons comprise eighty-five percent of the total meals. Ladies are not permitted in any of the Club's rooms on days other than New Year's Day, except that wives and daughters of members may use one of the dining rooms. (R. 294a-296a.)

¹ As of December 27, 1939, the membership consisted of: 11 accountants, 164 attorneys, 76 bankers, 50 brokers, 745 corporation executives, 11 educators, 53 engineers and architects, 10 financiers, 57 insurance agents, 4 judges, 5 ministers, 25 physicians and dentists, 17 public officials, 23 real estate agents, 38 retired persons, one who had no occupation, and 5 whose occupations were unknown (R. 153a-155a).

During the respective fiscal years ending March 31, 1936, 1937, and 1938, the gross income of the Club from all sources aggregated \$689,584.74, \$708,095.70, and \$733,195.49 (R. 299a).

The District Court concluded as a matter of law that the primary and predominating purpose of the Club is a business club, that any social features are incidental to this predominant purpose and not material to the Club's operation or existence, and that, therefore, the Club is not a social, athletic, or sporting club or organization within the meaning of Section 413 of the Revenue Act of 1928, as amended (R. 299a). The District Court, as appears from its opinion (R. 303a), relied primarily on the decision of the court below in *Union Club of Pittsburgh v. Heiner*, 99 F. (2d) 259, and declined to follow that of the Court of Claims in *Duquesne Club v. United States*, 23 F. Supp. 781, certiorari denied, 306 U. S. 649, which held that during a prior period (June 1929 to August 1935) petitioner was a social club within the meaning of the statute. Accordingly, it entered judgment for the petitioner in each case (R. 309a, 310a).

The court below reversed the judgments and in its opinion expressly overruled its decision in the *Union Club* case (R. 330, 331).

ARGUMENT

The decision of the court below is clearly correct. Under the test set forth in the applicable

regulations (Appendix, *infra*, pp. 10-12), adopted by the courts, and not disputed by petitioner, the purposes and activities of a club determine its character and, even if those are not predominantly social, the club is taxable as a social club if social features are a material and not merely an incidental part of its functions. See *Army and Navy Club of America v. United States*, 53 F. (2d) 277 (C. Cls.), certiorari denied, 285 U. S. 548; *The Lambs v. United States*, 8 F. Supp. 737 (C. Cls.), certiorari denied, 297 U. S. 713; *Engineer's Club of Philadelphia v. United States*, 42 F. Supp. 182 (C. Cls.), certiorari denied June 1, 1942, No. 1201, October Term, 1941, petition for rehearing filed June 19, 1942.

The predominant purpose of the Duquesne Club is plainly social, since, as is evident from the District Court's findings of fact, it is to provide its members a place to meet and have lunch with each other and discuss whatever subjects they may desire. The fact that the members use the Club as a place in which to discuss their business affairs and make business contacts does not alter its character as a social organization. The Club itself conducts no business. It was chartered for purposes of "social enjoyment" and its members, coming from various walks of life, pursue no common enterprise through the Club.

In any event, moreover, as was indicated by the court below (R. 329-330), even if the use of the Duquesne Club by its members for their individual business purposes were assumed to render the Club predominantly non-social, there is no proof that the social aspects of the luncheons and other activities during the period in question were only incidental features. The Court of Claims found in the earlier case involving the Club that its social features, including pool and billiard room, card tables, bars, lounges, bedrooms, and health department, were material to its operation and existence, and on that ground held it taxable. *Duquesne Club v. United States*, *supra*. Although the present case involves a succeeding period, the facts are substantially identical.

Petitioner asserts (Pet. 3, 6, 10-15) that the decision of the court below conflicts with the decisions of the Court of Claims in *Whitehall Lunch Club v. United States*, 9 F. Supp. 132, and *Bankers' Club of America, Inc. v. United States*, 37 F. (2d) 982, where comparable businessmen's lunch clubs were held to be not social, and with the decisions of several other courts.² Conflicts with all of the same decisions, except that in the

²*Page v. Squantum Ass'n*, 77 F. (2d) 918 (C. C. A. 1); *Tidwell v. Anderson*, 72 F. (2d) 684 (C. C. A. 2); *Union Club of Pittsburgh v. Heiner*, 99 F. (2d) 259 (C. C. A. 3) (overruled in the instant case); *Krug v. Rasquin*, 21 F. Supp. 866 (E. D. N. Y.).

Whitehall Lunch Club case, were relied on in the petition (pp. 4-5) for writ of certiorari filed by petitioner in the earlier case and denied by this Court (306 U. S. 649, No. 635, October Term, 1938). Each case necessarily turns on its own particular facts and insofar as the *Whitehall Lunch Club* and *Bankers' Club* decisions appear to be in conflict with the decision herein they must be viewed in the light of the subsequent decisions of the Court of Claims in the *Duquesne Club* and *Engineers Club* cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

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